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FROM: George T. Sinas and Stephen H. Sinas

DATE: September 12, 2012

RE: Analysis of HB 5864 (New Tort Threshold Bill)

Pursuant to your respective requests, we have analyzed HB 5864 which was introduced by Representatives Lyons and Haveman on September 11, 2012. This bill amends the 3rd party tort provisions of Section 3135 of the Michigan No-Fault Act. This proposed legislation is far worse than the threshold standard adopted by the Michigan Supreme Court in *Kreiner v Fischer* [overruled by *McCormick v Carrier* (2010)]. More importantly, this bill could eliminate almost all third-party tort claims against at-fault drivers.

The main thrust of the proposed bill seeks to fundamentally change the current legislative definition of the threshold requirement of "*serious impairment of body function*" set forth in Section 3135(7) of the No-Fault Act. This definition was promulgated by the Legislature, nine years before the Supreme Court decided *Kreiner* (1995 PA 222). Until the *Kreiner* decision was rendered, the legislative definition of serious impairment of body function in 1995 PA 222 maintained the critically important balance that must inherently exist if our no-fault system is to remain viable. The current definition of serious impairment of body function is simple and states in its entirety:

"'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

In *Kreiner*, the Supreme Court judicially altered this legislative language by imposing the additional requirement that an impairment affect the injured person's general ability to live his or her normal life to the extent the "*course or trajectory*" of the injured person's life be impacted in a way that the person is generally or, for the most part, unable to live his or her normal life. Notably, *Kreiner* did not significantly

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alter previous case law definition of the "*objective manifestation*" or "*important body function*" threshold elements.

HB 5864 goes far beyond *Kreiner* and redefines all three (3) major threshold elements in such a way as to create an almost insurmountable tort liability threshold. The redefinition of these threshold elements will be discussed briefly below:

1) **Objective Manifestation** - This element has been redefined to require a "*medically identifiable*" injury or medically identifiable physical condition that was "*caused by the accident*" and that "*substantiates*" the victim's claimed impairments, complaints, and self-imposed restrictions. Although a part of this redefinition is similar to pre-*Kreiner* threshold law, it is more restrictive because it incorporates *causation* and *injury severity* elements into the definition of "*objective manifestation*" which, heretofore, only focused on *injury verifiability*. These newly engrafted definitional elements are likely to disqualify many people who have pre-existing conditions that were not caused by the accident, but were aggravated by the accident. In addition, this new definition will disqualify victims who have medically identifiable injuries or conditions that were caused by the accident, but that do not necessarily explain the full scope of the victim's current medical problems. In essence, the new objective manifestation definition imposes new and significant injury severity requirements that have never been part of threshold law.

2) **Important Body Function** - This element has been redefined so that a body function is only important if it is "*important to an average person, rather than important to the injured person.*" This redefinition will disqualify certain victims whose normal life requires physical skills and abilities that the average person may not need. For example, a fractured finger that causes loss of motion in that finger may be disastrous for a classical musician or a surgeon, but may not be "*important*" to an "*average person.*"

3) **Normal Life** - This element has been redefined so as to impose far more restrictive concepts of normal life impairment that existed under *Kreiner* or any other previous threshold regime. Specifically, the proposed legislation requires that the impairment be "*of sufficient severity and duration to affect the course and trajectory of the injured person's entire pre-accident normal life.*" In using these words, the proposed legislation imposes a significant durational element and re-institutes the *Kreiner course and trajectory* requirement, taking that element far beyond *Kreiner* by requiring that the victim's *entire* pre-accident normal life be changed. This will likely mean that the only victims who will be able to survive this threshold are those who are completely comatose. Even quadriplegics, paraplegics and catastrophically brain damaged persons may be disqualified if they are able to live some aspects of their pre-accident life.

Retroactivity - This bill applies to any pending case or case filed after its effective date.

Conclusion - If this bill or something similar to it were to be enacted, there would be almost no third-party claims that could be brought under the Michigan no-fault law. If that happens, the Michigan no-fault system will become so out of balance and so politically unstable that it probably will not survive. Therefore, stripped to its essence, HB 5864 is an indirect attempt to collapse and bring an end to the Michigan automobile no-fault system.